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In the

# [redacted] Court of the United States

[redacted] Term, [redacted]

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JOHN E. MALLARD,

*Petitioner,*

v.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
et al.,

*Respondent.*

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[redacted] Petition For A Writ Of Certiorari To The United States
Court Of Appeals For The Eighth Circuit

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BRIEF FOR THE RESPONDENT
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF IOWA

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## COUNTER-STATEMENT OF QUESTION PRESENTED

Is 28 U.S.C. Section 1915(d) consistent with the power of a federal district court to require an unwilling attorney to represent a person making a request for counsel thereunder?

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## STATEMENT OF THE CASE

The Eighth Circuit Court of Appeals in *Nelson v. Redfield Lithograph Printing*, 728 F.2d 1003, 1005 (8th Cir. 1984), writing in its "general supervisory authority involving district courts," directed the chief judge of each district "to obtain a sufficient list of attorneys practicing throughout the district so as to supply the court with competent attorneys who will serve in pro bono situations . . . ". In so ruling, the *Nelson* Court noted that it had "in the past acknowledged the express authority of the district court to make such appointments." *Nelson* at 1004. *See also Hahn v. McLey*, 737 F.2d 771 (8th Cir. 1984).

To implement the *Nelson* mandate, the Clerk of Court for the Southern District of Iowa, acting in cooperation with the Federal Practice Committee of the Iowa State Bar Association, began in 1984 to employ a list of active federal court practioners to receive *Nelson* appointments. (*See Coburn* Order, 6/16/87, Brief Opp. Cert., App. 1a.) The list, which had been compiled in 1982, consisted of attorneys who were counsel of record in five or more civil cases or two or more criminal cases in the preceding year.

Within about a year and a half it became clear that the list, which included only about 4% of federal court practitioners, was too short and that unless the pool of attorneys were expanded, a relatively small group of attorneys would be unfairly burdened.

A new system was initiated in February of 1986. The plan for the appointment process is reproduced as Appendix I to this Brief. Under the new system, once the

Court had ordered that counsel be appointed to represent an indigent in a civil case, the Clerk would forward a copy of the court file to the Volunteer Lawyers Project ("the Project"), a joint venture of the Legal Services Corporation of Iowa and the Iowa State Bar Association. The Project had been provided a roster of all attorneys licensed to practice and in good standing in the district, and used this roster in arranging for representation pursuant to the court order. However, the Project would pass over any attorney already participating in the representation of indigents on a *pro bono* basis through the Project's own referral system of cases screened through legal aid offices.

An attorney staff member of the Project, proceeding systematically through the list but making allowances for geographical convenience, would telephone an attorney and ask whether he or she had been of record in federal court (other than in bankruptcy court) within the previous five years. If so, the attorney was eligible to receive an assignment and the Project staff lawyer would describe the case and identify the parties.

If the contacted attorney protested that he or she was then too busy to take the case, a grace period of weeks or even months would be arranged to allow that attorney an opportunity to make room for a *pro bono* assignment in his or her caseload. If the contacted attorney expressed concerns about a lack of familiarity with the area of the law in question, the Project lawyer would explain the resource materials and other support available to assist assigned counsel. If no obstacle to the assignment appeared, a copy of the court file was sent to the newly-appointed counsel, and a notice of the assignment was



filed with the Court. At this point, the Project would also provide appointed counsel with legal resource materials relating to the case in question, as well as a description of how out-of-pocket costs of representation could be reimbursed by the court.

Through this process, John Mallard was contacted by the Project to represent the indigent plaintiffs in *Mark Allen Traman et al. v. Steve Parkin et al.*, Civil No. 87-317-B (U.S. District Court, S.D. Iowa), in June of 1987. (J.App. 4.) After receiving the court file in the case, Mallard filed a Motion to Withdraw. The Magistrate denied Mallard's motion to withdraw and ruled Mallard was competent. (Pet. App. 3a). Mallard sought the District Court's review of that finding, and asserted as an additional excuse for not serving that he "did not like the role of confronting other persons in a litigation setting, accusing them of misdeeds, or questioning their veracity." (J.App. 38).

The District Court affirmed the Magistrate's decision, and expressly ruled that "Section 1915(d) empowers the court to appoint attorneys to represent indigent civil litigants." (Pet. App. 3a).[1] Mallard then sought a writ of mandamus from the Eighth Circuit Court of Appeals to

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[1] Although not asserted by the District Court, its local practice can be affirmed as an exercise of authority granted by Rule 83 of the Federal Rules of Civil Procedure and 28 U.S.C. 2071, as discussed in Brief Point II by Amicus Bar of the City of New York. The Eighth Circuit did not address the validity of this local practice in its order but this separate and independent ground must be considered on review of this certiorari to a mandamus request. See n. 2.

compel the District Court to grant his motion to withdraw the appointment. The Circuit Court, without opinion, denied the application for the writ. Certiorari was granted on October 3, 1988, to review the denial of mandamus.[2]

## SUMMARY OF ARGUMENT

28 U.S.C. § 1915(d) is ambiguous. Statutes are not to be construed in any way which renders language superfluous. To give the statutory language meaningful effect, it must be understood to grant courts more than the power to plead with lawyers for their cooperative support. The historical context and contemporary language usage supports the interpretation that Congress intended to grant the Federal court a power which eleven states had at that time granted their own courts. The American statute appears to be a modernization of the English law without an attempt to alter the basic approach. That

[2] In *Gulfstream Aerospace Corp. v. Mayacamus Corp.*, 485 U.S. ___, 99 L.Ed.2d 296, 313 (1988), this Court reaffirmed the limited nature of mandamus. Limited to "exceptional circumstances" the writ may issue when there is a "judicial usurpation of power." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980); *Will v. United States*, 389 U.S. 90 (1967). The party seeking mandamus has the "burden of showing that its right to issuance is clear and indisputable." *Bankers Life and Casualty v. Holland*, 346 U.S. 379 (1953).

Petitioner did not demonstrate to the Eighth Circuit that the District Court of Iowa exceeded its authority, clearly and indisputably. The order of the Eighth Circuit Court of Appeals may be affirmed if the District Court had the authority from whatever source to appoint Petitioner, even if it relied on an incorrect reason. *Helvering v. Gowran*, 302 U.S. 238 (1937).



approach is consistent with a long tradition of professional obligation to the administration of justice.

28 U.S.C. § 1915(d) is consistent with and in recognition of the inherent power of the court to regulate the conduct of attorneys before it, and to provide for meaningful assistance by attorneys and others in the administration of justice. Additionally, the local policy of the District Court of Iowa is consistent with the powers granted to local district courts by Federal Rule of Civil Procedure 83, and 28 U.S.C. § 2071.

Sound public policy considerations support the reasonableness of the interpretation that the 1892 statute was consistent with the essential role of attorneys in partnership with the courts in the administration of justice. Congress could have reasonably believed that providing courts with the discretionary power to direct counsel to represent indigents would foster meaningful access to the courts. Additionally, involvement of counsel prevents the waste of valuable judicial time, by sharpening the issues, shaping the examination of witnesses, shortening the trial, and assisting in a just determination.

Lawyers have de facto control over the distribution of a fundamental and valuable resource, namely access to society's tribunals. With the license to dispense this resource for a fee comes certain duties, including the duty to see that the poor and unpopular are not excluded. In granting lawyers the exclusive right to advise on the law and advocate in the courts, lawyers are placed in a unique role, with roots deep in the Constitution.

The constitutional arguments Petitioner raises for the first time in his brief are insufficiently supported in the

record to allow for a fair and fully informed decision. The Fifth Amendment does not require that the government pay for the performance of a public duty it is already owed. Petitioner knew in advance that some measure of public claim would be made upon his skilled services. Any expectation to the contrary is unreasonable and the services are to that extent not private property. There is no "taking".

As an exercise of section 1915(d) discretion, or of inherent power, under the circumstances demonstrated in this record, there is no abuse of discretion by the Federal District Court for Iowa. Mandamus will not lie where the district court has acted within its jurisdiction and rendered a decision which, even if erroneous, involved no abuse of power. The system under which Mallard was appointed was reasonably designed to accommodate the needs of the litigants, the bar, and the court.

## ARGUMENT

### I. 28 U.S.C. SECTION 1915(d) RECOGNIZES THE POWER OF FEDERAL DISTRICT COURTS TO REQUIRE ATTORNEYS TO REPRESENT INDIGENTS IN CIVIL CASES

By its terms, 28 U.S.C. section 1915(d) authorizes a federal court to "request an attorney to represent any such person unable to employ counsel . . . ." The issue as framed by Mr. Mallard is whether the court's power to *request* an attorney's service is intended to embrace the power to *require* it.



The Circuit Courts of Appeal have divided on the question. While some circuits have clearly held that courts may require such service under section 1915(d), *see Nelson v. Redfield Lithograph & Printing*, 728 F.2d 1003, 1005 (8th Cir. 1984), *Whisenant v. Yuam*, 739 F.2d 160 (4th Cir. 1984), others have just as clearly held that the statute grants no power to compel an attorney to provide representation, *see U.S. v. 30.64 Acres of Land*, 795 F.2d 796 (9th Cir. 1986), *Reid v. Charney*, 235 F.2d 47 (6th Cir. 1956).

Still other circuits either appear on both sides of the issue, *compare Caruth v. Pinkney*, 683 F.2d 1044 (7th Cir. 1982), cert. denied, 459 U.S. 1214 (1983) with *McKeever v. Israel*, 689 F.2d 1315 (7th Cir. 1982), or characterize the statute as granting the power to "appoint" counsel, without forthrightly discussing the issue of compelling an attorney's service, *see e.g., Hodge v. Police Officers*, 802 F.2d 58 (2nd Cir. 1986).

### A. SETTLED PRINCIPLES OF STATUTORY CONSTRUCTION SUGGEST THAT THE COURT HAS THE POWER TO COMPEL AN ATTORNEY'S SERVICE

Petitioner invokes the principle that statutory language should be accorded its plain meaning and argues that the word "request" does not and cannot include an element of compulsion.[3] But another fundamental principle of statutory construction bears on this question as

[3] The meaning of the word is not as plain as Petitioner suggests. Webster's Ninth New Collegiate Dictionary (1985) includes: "request: the state of being sought after: DEMAND." *Id.*

(Continued on following page)

well, namely the rule that statutory language is not to be given an interpretation which renders that language superfluous. *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498 (1986) ("It is an 'elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.' [Citation omitted.]").

It is difficult to imagine that a federal court would believe that statutory authorization was needed before it could ask (not compel, but simply *ask*) a lawyer to assist a poor person in judicial proceedings. Whatever the outermost limit might be of a federal court's inherent power to *compel* a lawyer's service, it has never been so doubtful as to call into question the court's ability to ask a lawyer to volunteer to provide representation in a case before the court.[4]

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at 1001. Moreover, it is the plain meaning of the word as used in 1892, when the statute was enacted, which is relevant. Anderson's Law Dictionary (1889), notes that 'request' and 'require' are words of the same origin, and that their "somewhat different meanings . . . are really more distinctions in intensity than in effect or substance." *Id.* at 885-6. The entry in the 1883 Dictionary of American and English Law cites several cases under the heading: "REQUEST, (synonymous with 'require')". *Id.* at 1109.

[4] The construction given section 1915(d) by the district court does not impinge upon but is consistent with its inherent power, fully discussed in Brief Point III of Amicus Association of the Bar of the City of New York. The District Court's inherent power to regulate attorneys practicing before it has been recognized in cases of abuse of the judicial process, *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), and sanctions

(Continued on following page)



If this is so (and it is hard to deny without casting into doubt the very notion that federal courts are vested with some measure of inherent power), then Petitioner's interpretation of the "request" language of section 1915(d) renders that provision a nullity. To give the statutory language meaningful effect, it must be understood to grant courts more than the "power" to plead with lawyers for their cooperative support in administering justice. *See United States v. Powers*, 307 U.S. 214, 217 (1938), quoting from *Bird v. United States*, 187 U.S. 118, 124 (1902) ("There is a presumption against a construction which would render a statute ineffective or inefficient. . . ."). *See also Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 392 (1939) (That interpretation is preferred "which will preserve the vitality of the Act and the utility of the language in question.").

It is more plausible that Congress viewed a court's "request" that an attorney provide service to be tantamount to a directive. A court's power in directing the activities of the attorneys who appeared before it was perceived by Congress to be such that a request by the court was, from the viewpoint of the attorney (an "officer of the court"), indistinguishable from a command. When

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for failure to prosecute. *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962). Similar to the example in this case, inherent power may be exercised by "courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link*, 370 U.S. at 625-626. Case management includes the power to appoint "appropriate instruments". *Ex parte Peterson*, 253 U.S. 300 (1920). Members of the bar, like auditors and examiners, are another of those instruments whose appointment may be necessary for the administration of justice.

section 1915(d) was considered, Congress could certainly have believed that submission by an attorney to the express desires of the court was taken for granted. Any distinction between "request" and "require" was unknown in the context. Reported challenges of a court's authority to compel a lawyer's service are, after all, a modern phenomenon (as opposed to later requests for compensation).[5]

### B. LEGISLATIVE HISTORY AND HISTORICAL CONTEXT SUGGEST THAT CONGRESS INTENDED SECTION 1915(d) TO BE SUPPLEMENTARY TO CONTEMPORARY PRACTICE.

The wording of section 1915(d) is ambiguous.[6] The legislative history suggests that Congress intended that district courts have the power to compel representation of indigent civil clients. Section 1915(d) is a recognition of

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[5] Perhaps this is a result of judicial exposition on the statutory language. For the first forty years after the enactment of section 1915(d), each decision used the word "assign" to describe the statute, including this court in 1948. *Adkins v. E.I. DuPont De Nemours & Co. Inc.*, 335 U.S. 331, 342-343 (1948). ("As pointed out, section 4 of the statute makes it abundantly clear that poor litigants shall have the same opportunity to be represented by counsel as litigants in more fortunate financial circumstances."). In a contemporary statement describing the possible requirements of bar membership, this Court suggested that "a non-resident bar member like the resident member, could be required to represent indigents . . . ." *S.Ct. of New Hampshire v. Piper*, 470 U.S. 274, 287, and citation at n. 22 (1985).

[6] Although Petitioner argues to the contrary, his position is negated by the split in the circuits on the very question posed.



that intent and the power of the court. Where the wording of the statute is ambiguous, the court may consider the legislative history to discern the intent. *Commissioner of Internal Revenue v. Engle*, 464 U.S. 206 (1984). Words used must be looked at in light of their contemporary meaning and usage. *Lake County v. Rollins*, 130 U.S. 662 (1889).

#### 1. Legislative History

At least part of the impetus for enacting the original *in forma pauperis* legislation in 1892 was to grant the federal courts a power which eleven states had at that time granted their own courts. The House Report from the Committee on the Judiciary which accompanied the proposed *in forma pauperis* legislation stated that "[m]any humane and enlightened States have such a law, and the United States Government ought to keep pace with this enlightened judgment."[7] It is noteworthy that of the eleven state statutes which provided for the appointment of counsel, ten explicitly prohibited the attorney from taking a fee.[8]

When the federal legislation was proposed in the House, it was entitled and referred to as an Act "providing when plaintiff may sue as a poor person and when

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[7] H.R. Rep. No. 1079, 52d Cong., 1st Sess. 1 (1892).

[8] Fisch, Coercive Appointments of Counsel *In forma Pauperis*: An Easy Case Makes Hard Law, 50 Mo. L. Rev. 527, 547 (1985).

counsel shall be assigned by the court"[9], which "assignment" language was uniformly used in subsequent references.[10] To the drafters of the section, the words "request" and "assign" were interchangeable.

One exchange during the debate over the bill provides considerable insight into the basic approach which was embodied in the bill. At one point Representative Stone asked the sponsor of the bill how court officers were to be paid, and whether they were being forced to work for nothing. Representative Culbertson responded:

> We are simply in these cases of charity and humanity compelling these officers, all of whom make good salaries, to do this work for nothing. That is all the bill does. There may be one such case upon a docket of five hundred; and they are not required to do much ex-officio service.[11]

Admittedly, this exchange may have been limited to those "officers of court" who were required under another section of the bill to "issue, serve all process, and perform all duties in such cases."[12] Nevertheless, this treatment of the judicial officers is telling. If non-attorney court personnel were being required to perform their respective services without pay, it is all the more likely that attorneys, who were doubtless better compensated

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[9] 23 Cong. Rec. 5199 (1892); 27 Stat. 252 (1892).

[10] *Id.* at 5245, 6192, 6264, 6330, 6348, 6543.

[11] *Id.* at 5199.

[12] "Sec. 3. That the officers of court shall issue, serve all process, and perform all duties in such cases." *Id.* at 5199.



and who had acknowledged professional obligations, would be expected to serve unpaid. Indeed, limiting the compensation discussion to non-attorney personnel suggests again that it was assumed that attorneys would serve without pay by virtue of the traditional duties of the profession.

Although the legislative record of the enacting Congress does not reflect any forthright discussion of whether section 1915(d) grants a court the power to compel an attorney's service, the United States Senate later had occasion to consider the issue in a closely analogous situation. Senator Sam Ervin offered amendments dealing with the court's power to appoint counsel to represent complainants in suits under Titles II and VII. Each provided that "the court may appoint an attorney" for the civil rights complainant. 42 U.S.C. § 2000a-3(a); 42 U.S.C. § 2000e-5(f)(1). "My amendments," Ervin stated, "would merely specify that the judge could not appoint an attorney to represent a complaining party in private litigation under those two titles without the consent of such attorney."[13]

The amendments were defeated by a vote of seventy-one to twenty-six, with three not voting. Although the language differs, nevertheless this vote reveals that the Senate in a related civil rights context took a firm position on the desirability of compelling attorneys to provide representation at the court's discretion. The earlier

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[13] 110 Cong. Rec. 14, 201 (1964).

1892 Congress intended to recognize the same prerogative in the courts of the day through the enactment of section 1915(d).

### 2. Original Statutory Language

The original 1892 statute provided, in pertinent part, that "the court may request any attorney of the court to represent such poor person. . . ." Chap. 209, 27 Stat. 252, enacted in 1892. In interpreting the force of the word "request", it is worth noting that request was first paired with the phrase "any attorney of the court." The use of the word "any" suggests an unrestricted range of choice on the part of the judge selecting counsel. It would have been unnecessary to explicitly provide the court an unrestricted range of choice if the court were only empowered to issue a request which the lawyer could freely decline.

Furthermore, the language "attorney of the court" calls to mind the phrase "officer of court" and its attendant sense of connectedness and obeisance to the court. The change in language to its current form may reflect later linguistic habits and conventions, but does not indicate any intention to alter the original thrust of the provision.[14]

### 3. Statement of Purpose

In enacting the *in forma pauperis* statute, Congress was motivated by its belief that access to the courts

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[14] The change to the current language of subsection (d) was effected in 1948. The 1952 edition of the United States Code Annotated refers to the change only as one of the "changes in phraseology."



should not be denied "for want of sufficient money or property to enter the courts under their rules."[15] "Will the government allow its courts to be practically closed[16] to its own citizens, who are conceded to have valid and just rights, because they happen to be without the money to advance pay to the tribunals of justice?" H.R. Rep. No. 1079, 52nd Cong., 1st Sess. 1 (1892).

Congressional concern that the courts not be "practically closed" to citizens was expressed through a mechanism for waiving court costs and through the language "supplementing" the power of the court to provide legal counsel to the poor.[17] Petitioner argues that Congress saw a fundamental need, cast it in terms of the vindication of "valid and just rights" of "citizens", and then contributed no meaningful solution, or granted the courts no effective power. It should instead be assumed that the law Congress passed to meet a clearly identified need was intended to be equal to the task.

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[15] H.R. Rep. No. 1079, 52d Cong., 1st Sess. 2 (1892).

[16] To the pro se litigant, access to court may be denied just as effectively by denial of counsel, though not as efficiently or abruptly as imposition of a filing fee.

[17] *See United States v. Bower*, 698 F.2d 560, 566 (2d Cir. 1983), regarding the Criminal Justice Act, 18 U.S.C. § 3006A "supplementing" the court's inherent power to appoint counsel, discussed in Brief Point III of Amicus Brief of Association of the Bar of the City of New York.

### 4. English Predecessor

One of the earliest cases to interpret section 1915(d) used the word "assign" in discussing the statute. *Brinkley v. Louisville & N.R. Co.*, 95 F. 345, 353 (C.C.W.D. Tenn. 1899). The court in *Brinkley* suggested that the then recently-enacted *in forma pauperis* statute should be interpreted in the light of the early English statute of Henry VII after which the American law was said to be modeled.[18]

The English statute in question, enacted in 1495, and in effect until 1883, was recently described and quoted as follows:

> It stated that the chancellor should assign 'learned counsel and attornies' for the preparation of suits 'without any reward taking therefore; and after the said writ or writs be returned, if it be afore the King in his bench, the justices there shall assign to the same poor person or persons, counsel learned, by their discretions, which shall give their counsels, nothing taking for the same: and likewise the justices shall appoint attorney and attornies for the same poor person or persons, and all other officers requisite and necessary to be had for the speed of the said suits to be had and made, which shall do their duties without any reward for their counsels, help and business in the same'.[19]

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[18] The *Brinkley* court declined to exercise its discretion to appoint a lawyer for the indigent before the court, as that person was a lawyer and able to represent himself.

[19] 11 Henry 7, c. 12 (1495), quoted in Shapiro, The Enigma of the Lawyers' Duty To Serve, 55 N.Y.U.L. Rev. 735, 741 (1980). The "discretion" (line 7) evidently is that of the justices, not counsel. The same statute in an unquoted portion provides waiver of costs to impoverished litigants "by the discretion of the Chancellor". See Maguire, Poverty and Civil Litigation, 36 Harv. L.Rev. 361, 373 (1923).



The American statute appears to be a modernization of the language of the English law, but does not appear to alter the basic approach. Indeed, had Congress wished to distinguish the operation of its new law from that of its notable English predecessor, it would have done so in clear terms.

### 5. Historical Context

One commentator has suggested that the choice of the word "request" in section 1915(d) was not intended to deny the court the power to compel an attorney's services, but rather was intended to be synonymous with "assign" and "appoint." The statutory language was employed, it is argued, in an effort to convey to the federal bench that a litigant need not request counsel before the court could arrange an appointment–the court may act *sua sponte*, and issue its own "request."[20]

But again, the most plausible explanation for Congress' use of the word "request" is that the differences between "request" and "assign" were simply not seen as meaningful. The tradition of service by lawyers to the

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[20] Dow, Appointment of Counsel and Section 1915(d); Pauper Privilege and Judicial Discretionary Duty, unpublished manuscript being prepared for publication under the supervision of Professor Geoffrey C. Hazard, Jr., Yale Law School; relevant portions are reproduced in the Appendix III. Dow notes that earlier practices involving assignment of counsel sometimes placed unreasonable obstacles in the impoverished litigant's path and burdened the applicant unduly. As to modern statutes which authorize appointment upon application, *see e.g.*, 42 U.S.C. § 1971 (f) (1982); 42 U.S.C. § 2000e-5(f)(1) (1982).

courts was too well established to admit of doubt and is reflected in this Court's own pronouncement, forty years after the enactment of section 1915(d), that "[a]ttorneys are officers of the court, and are bound to render service when required by . . . appointment."[21]

This tradition of professional service would have been as readily perceived by legislators in 1892 as it was by this Court in 1932. In 1868, in the context of criminal defense, Professor Thomas Cooley wrote:

> The humanity of the law has generally provided that, when the prisoner is unable to employ counsel, the court may designate some one to defend him, who shall be paid by the government; but when no such provision is made, it is a duty which counsel so designated owes to his profession, to the court engaged in the trial, and to the cause of justice, not to withhold his best exertions in the defence of one who has the double misfortune to be stricken by poverty and accused of crime. No one is at liberty to decline such an appointment, [footnote omitted] and it is to be hoped that few would be disposed to do so.[22]

At least one contemporary commentator has concluded that "the notion that an unwilling lawyer could be forced to serve without fee . . . seems never to have found

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[21] *Powell v. State of Alabama*, 287 U.S. 45 (1932).

[22] Cooley, *Constitutional Limitations* (1868), p. 334. As part of the omitted footnote, Cooley adds: "[A] court has the right to require the service, whether compensation is made or not; and that counsel who should decline to perform it, for no other reason than that the law does not provide pecuniary compensation, is unfit to be an officer of a court of justice" p. 334, n.1.



universal acceptance."[23] But universal acceptance is a needlessly demanding standard. In 1892, the legal profession's own general view of itself involved a strong duty to serve the court in administering justice to the poor. It is reasonable to presume that Congress, enacting *in forma pauperis* legislation, was aware of this general perception.

## II. PUBLIC POLICY CONSIDERATIONS SUPPORT RESPONDENT'S INTERPRETATION OF SECTION 1915(d)

To interpret ambiguous statutes, this Court seeks "to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested." *NLRB v. Lion Oil Co.*, 352 U.S. 282, 297 (1957) (Frankfurter, J., concurring in part and dissenting in part). *See also Watt v. Alaska*, 451 U.S. 259, 265-266 (1981).

Policy considerations are properly brought to bear in statutory interpretation, but only to the extent that "specific policy choices fairly can be attributed to Congress itself." *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 221 (1980).

The policy discussions which follow are intended to serve four purposes: to shed light on the policy concerns which likely animated Congress; to discern the appropriate breadth of the inherent power possessed by federal courts; to provide a proper context for determining whether the district court acted reasonably and

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[23] Shapiro, The Enigma of the Lawyers' Duty to Serve, 55 N.Y.U.L. Rev. 735, 753 (1980).

pursuant to its constitutional duties; and to counter some of the dubious policy arguments raised by Petitioner and by the California Amici.

### A. FEDERAL COURT LITIGANTS WHO CANNOT OBTAIN COUNSEL MAY BE DENIED JUSTICE

It is the rare *pro se* citizen asserting or defending against claims in federal court who is not greatly disadvantaged. The disadvantage is daunting enough not only to keep some from persevering in asserting their rights, but also to keep many others from asserting them in the first instance. It is compounded in the case of citizens who must contend with other impediments, natural or circumstantial, such as a lack of education, or the restrictions of institutionalization.

Societal efforts to meet this need for legal help have been halting and inadequate. As the brief of Amicus Legal Services Corporation of Iowa notes, federal funding for the Legal Services Corporation, the primary vehicle for providing legal help to the poor in civil cases, has never been adequate to meet the need. While a patchwork of other sources of legal assistance exists, no one seriously asserts that the poor have sufficient access to counsel in civil cases. That the need exists is conceded by Amicus State Bar of California. Brief p. 19. It is one of the means chosen by Congress and the Iowa District Court to address that need, with which Amicus and Petitioner disagree.

Just as it is unreasonable to contend that civil legal help to the poor is in ample supply, it is unfortunately



just as unreasonable to contend that some form of mandatory *pro bono*, standing alone, will meet the need. The wisdom of any one component, or of the construction of any system designed to fully address this need, are issues of public policy best left to Congress and the state legislatures. The issue for the Court is narrower. Could Congress have reasonably believed that providing courts with the discretionary power to direct counsel to represent indigents would foster meaningful access to the courts?

### B. THE INVOLVEMENT OF COUNSEL BENEFITS THE COURTS

Courts have repeatedly acknowledged the benefits trial judges and appellate courts derive from having counsel present a case which would otherwise have been presented *pro se*. *See e.g., Heidelberg v. Hammer*, 577 F.2d 429, 431 (7th Cir. 1978)(" . . . [I]t is extremely helpful to the court to have the plaintiff represented by counsel in a case such as this [a prisoner's section 1983 action]. . . . Although a court is understandably reluctant to impose on an attorney the burden of representing a party in a civil case without a fee, the attorney who accepts such an appointment can perform a valuable service, if only in preventing the waste of valuable judicial time."); *Ulmer v. Chancellor*, 691 F.2d 209, 213 (5th Cir. 1982) ("The district court should also consider whether the appointment of counsel would be a service to Ulmer and, perhaps, the court and defendant as well, by sharpening the issues in the case, shaping the examination of witnesses, and thus shortening the trial and assisting in a just determination."). *See also Bounds v. Smith*, 430 U.S. 817, 826 (1977)

("Even the most dedicated trial judges are bound to overlook meritorious cases without the benefit of an adversary presentation.").

Court calendars are notoriously crowded, and an attorney helps preserve judicial resources by bringing his or her legal judgment to bear in winnowing out duplicative witnesses, abandoning ineffective arguments or lines of inquiry, and generally streamlining proceedings. The special solicitude and latitude a court grants the *pro se* litigant, while serving to diminish somewhat the ill-effects of lack of counsel, is itself likely to further drain the court's resources.

## C. CONGRESS INTENDED TO RECOGNIZE THE PUBLIC POLICY CONSIDERATIONS WHICH SUPPORT A SYSTEM UNDER WHICH LAWYERS MAKE PRO BONO CONTRIBUTIONS TO THE ADMINISTRATION OF JUSTICE

The interpretation of section 1915(d) urged here is consistent with the long tradition of the lawyer's professional obligation to the poor, to the courts, and to the administration of justice.

### 1. Historical Background

The lawyer's duty to represent impoverished litigants at the instance of the Court is deeply rooted, and extensively discussed in *United States v. Dillon*, 346 F.2d 633, 636 app. (9th Cir.), *cert. denied*, 382 U.S. 978 (1965), and cited with approval in *Hurtado v. United States*, 410 U.S. 578, 589 (1973).



The *Dillon* court noted that English historical records from as early as 1292 reveal the prayer of plaintiff's that the court "grant them a serjeant . . . for that they are poor folk." *Dillon*, 346 F.2d at 636, n. 2. Presumably this prayer evidences some disposition on the part of the courts to grant such entreaties. The practice of representing the poor upon court assignment, without fee, extends at least to fifteenth-century England, where "serjeants-at-law" could be required by the courts before which they practiced "to plead for a poor man." *Dillon*, 346 F.2d at 636.

It is not surprising that when the American legal profession became sufficiently coherent and self-conscious to express its own views as to its duties, the *pro bono* obligation and the obligation to assist in the administration of justice were given prominence. The first detailed treatments of the American lawyer's ethical responsibilities were set forth by Baltimore lawyer David Hoffman in "Fifty Resolutions In Regard To Professional Deportment",[24] and George Sharswood's 1854 "Essay on Professional Ethics".[25] These premier works "were the progenitors of the profession's major codes of ethics. The draftsman of the Alabama Code of Ethics, Judge Thomas Goode Jones, relied heavily on the earlier works; the Alabama Code was the model for the ABA Canons [of Professional Ethics of 1908] which in turn was the basis

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[24] D. Hoffman, Fifty Resolutions, 2 A Course of Legal Study 752 (2d Ed. 1836).

[25] G. Sharswood, A Compend of Lectures on the Aims and Duties of the Profession of the Law (1854).

for the Model Code [of Professional Responsibility of 1969]".[26]

Hoffman refers in Resolution VI to the lawyer as "an officer of the court" obligated to those unable to afford counsel. Resolution XVIII states:

> Those who can afford to compensate me, must do so; but I shall never close my ear or heart because my client's means are low. Those who have none, and who have just causes, are, of all others, the best entitled to sue, or be defended; and they shall receive a due portion of my services, cheerfully given.

George Sharswood echoed the nature of the obligation:

> There are many cases, in which it will be [counsel's] duty, perhaps more properly his privilege, to work for nothing. It is to be hoped, that the time will never come, at this or any other bar in this country, when a poor man with an honest cause, though without a fee, cannot obtain the services of honorable counsel, in the prosecution or defence of his rights.[27]

To Sharswood, an attorney held "an office in the administration of justice, held by authority . . . [of] the majesty of the commonwealth". Because of the rights and privileges granted "to no other class or profession", a duty was owed in recompense.[28]

The ABA Canons of Professional Ethics of 1908 built upon these foundations. Canon 12 stated that "[i]n fixing

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[26] Patterson, Legal Ethics and the Lawyer's Duty of Loyalty, 29 Emory L.J. 909, 935 (1980).

[27] G. Sharswood, supra, at 83.

[28] G. Sharswood, *Id.* at 11.



fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade." The Canons refer to "the office of attorney" (Canon 15), and even pronounce attorneys "ministers" of the law (Canon 32), with the "duty of aiding in the administration of justice." (Canon 22.)[29]

These descriptions of the profession have been supplemented by modern observers. *See e.g.*, Woodrow Wilson, address to the American Bar Association in 1910, "The Lawyer and the Community", 35 A.B.A. Reports 419, 435 (1910) ("You are not a mere body of expert business advisors in the field of civil law or a mere body of expert advocates. . . . You are the servants of the public, of the state itself. You are under bonds to serve the general interest . . . "); Henry S. Drinker, *Legal Ethics* 5 (1953) (Two of the "[p]rimary characteristics which distinguish the legal profession from business are: 1. A duty of public service, of which the emolument is a by-product . . . 2. A relation as an 'officer of the court' to the administration of justice . . . "); Roscoe Pound, *The Lawyer From Antiquity to Modern Times* VII (1953) ("The legal profession is a public profession. Lawyers are the public servants. They are the stewards of all the legal rights and obligations of all the citizens. It is incumbent on stewards, if they are to be faithful to their trust, to render an accounting from time to time.").

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[29] For a discussion of the history of the debate over whether this duty should result in a mandatory *pro bono* component, *see State ex rel Scott v. Roper*, 688 S.W.2d 757, 763-764 (Mo. Banc. 1985.)

## 2. The Nature Of A Profession

The practice of law is distinguished from a business or trade by its high standards of conduct and commitment to public service. The earning of a livelihood is to be considered incidental to its primary purpose, namely, "the pursuit of the learned art in the spirit of public service."[30]

In Iowa, that public service requires *pro bono* work. It is against this backdrop that the orders of the district court must be viewed. "Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of *each lawyer*. . . ." Iowa Code of Professional Responsibility for Lawyers, EC 2-27 (emphasis added).

For Iowa lawyers this Ethical Consideration is not merely aspirational. The Iowa Supreme Court has repeatedly held that compliance by Iowa lawyers with the terms of Ethical Considerations is mandatory, and that violation of an Ethical Consideration, standing alone, provides grounds for disciplinary action. *See Committee On Professional Ethics and Conduct of State Bar Ass'n v. Behnke*, 276 N.W.2d 838, 840 (Iowa 1979), appeal dismissed 444 U.S. 805 (1979). In acknowledgement of duty, the Iowa lawyer upon admission to the bar takes a statutory

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[30] R. Pound, *The Lawyer From Antiquity to Modern Times* 5 (1953).



oath, "[n]ever to reject for any consideration personal to the attorney or counsellor the cause of the defenseless or oppressed." Iowa Code § 602.10112(7) (1987).

Lawyers have de facto control over the distribution of a fundamental and valuable resource, namely access to society's tribunals, or, at the highest level of abstraction, justice. Through license and regulation, the state actively excludes non-lawyers. This vigorous restriction of the unauthorized practice of law is undertaken in the public interest. Lawyers, as well as the public in general are the beneficiaries of those restrictions. With the license to dispense this resource for a fee comes certain duties, including the duty to see that the poor and unpopular are not excluded.

The argument that this duty could be expected of all professions and state-licensed occupations is simply not valid. In granting lawyers the exclusive right to advise on the law and advocate in the courts, lawyers are placed in a unique role, with roots deep in the Constitution. The societal importance of the role of the lawyer is reflected in the constitutional right to counsel. The concept of justice through fair treatment in the courts occupies a central role in our constitutional framework.[31] Other professions are vital. Other licensed occupations receive and

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[31] "The United States Constitution provides in part: 'We the People, of the United States, in order to form a more perfect union, establish Justice . . . ' Noting that our forefathers designated the *establishment of justice* of such priority as to

(Continued on following page)

deserve state regulation. But the Constitution is silent on the subject of medicine, dentistry, engineering, accounting, architecture and education.

Society permits only one group to earn a living – in most cases, a very good living – through the effective control of access to the courts and the consequent dispensation of justice. That special obligations should attend this privilege, including the obligation to enable meaningful access to the courts for impecunious citizens, is not unreasonable.[32]

## III. CONSTITUTIONAL ARGUMENTS

### A. THE CONSTITUTIONAL QUESTIONS PETITIONER RAISES FOR THE FIRST TIME IN HIS BRIEF TO THIS COURT OUGHT NOT BE CONSIDERED

Neither the magistrate, the U. S. District Court, nor the Eighth Circuit Court of Appeals were presented constitutional questions for their consideration in this cause. The Petition for Certiorari identified no constitutional questions.

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make it the second phrase of that magnificent document, ABA President Robert Raven contends that they intended government has the primary responsibility to ensure that legal services are available to the poor. I couldn't agree more. Our profession, like any profession has a duty to supplement the effort of government." President David Funkhouser, "President's Letter", Iowa State Bar News Bulletin, Vol. 48, No. 9, October, 1988.

[32] See also, H. Drinker, *Legal Ethics* 59 (1953) ("In recognition of these exclusive privileges the lawyer is charged with certain obligations to the public [including the duty] to represent without charge those unable to pay.")



In justifying the late transformation of this statutory interpretation question into a multi-faceted constitutional issue, Petitioner observes that under Supreme Court Rule 21.1(a) the statement of the question presented in the Petition for Certiorari is "deemed to comprise every subsidiary question fairly included therein." He suggests this rule permits the introduction of any and all constitutional issues which an appellant might belatedly conceive, since the avoidance of constitutional difficulties is a basic principle of statutory construction.[33]

The existing record does not embrace sufficient facts to allow for a fair and fully-informed decision on the newly-introduced constitutional questions. The record should reveal a far more detailed picture of Mallard's circumstances, the mechanics of the assignment system, and the level of need of the *pro se* litigants as well as the courts, as justification for the use of the power of assignment.

Specifically, a thorough exploration of the shades of constitutional meaning in this context should take into account: the nature and extent of *pro bono* work Mallard performed during the relevant period; the full range of

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[33] Petitioner also suggests that this case involves "appropriate circumstances" for consideration of these new issues. R. Stern & E. Gressman, *Supreme Court Practice*, Sections 3.24, 6.25, and 6.26 (6th Ed. 1986). Cases in which the Court has found "appropriate circumstances" have generally involved one or more of the following factors: (1) origination in federal rather than state court; (2) interpretation of federal rather than state law; (3) presence of sufficient facts in the record to allow for a fair and intelligent decision on the new issue; (4) opportunity for opposing parties to present briefs on the new issue; and (5) relevance of the new issue to an intelligent resolution of the case.

Mallard's current practice at the time of the assignment (it was "primarily" a "business and securities law practice"); details concerning Mallard's past litigation and courtroom experience; Mallard's level of activity in the three federal court cases in which he appeared in early 1987; Mallard's income from the practice of law, and the degree of financial hardship (if any) the assigned representation would create; the extent of practical support available to Mallard, through his own law firm and other resources; the intensity and nature of Mallard's dislike for "confrontational and accusatory speech", as this relates to his first amendment claims; figures indicating the likelihood of success of *pro se* section 1983 suits, as compared to section 1983 suits in which counsel appears; the frequency with which attorney fees are recovered by assigned counsel from the opposing party, and the amounts of such recoveries; the extent of the benefit derived by the court from the service provided by assigned counsel.[34]

Petitioner's belated introduction of constitutional questions into this cause has raised issues too important

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[34] That these are factors to be evaluated is discussed in Shapiro, "The Enigma of the Lawyers' Duty to Serve", 55 Harv. L. Rev. 735, 755 (1980). If the burden of the appointment far outweighs the benefit conferred through the license to practice, then the Fifth Amendment may require compensation. *See also Family Division of Trial Lawyers v. Moultrie*, 725 F.2d 695, 705 (D.C. Cir. 1984) ("an unreasonable amount of required uncompensated service might qualify."). The District Court of Iowa however followed a procedure which insured Petitioner was not overburdened, had he ever made that claim.



to be decided on the available record. Without waiver, Respondent will discuss each of his claims.

## B. COMPELLING MALLARD TO PROVIDE REPRESENTATION IN THE *TRAMAN* CIVIL RIGHTS CASE DID NOT VIOLATE HIS FREEDOM OF SPEECH

Mallard argues that he cannot be compelled to provide representation in the *Traman* case "because such representation necessarily requires the exercise of his speech (i) against his will (in light of his belief that he is not competent to undertake the representation) and (ii) in a manner that is contrary to his good conscience (in light of his dislike for confrontational and accusatory speech)." Petitioner's Brief, p. 40.

In support of this position, Mallard cites *Elfbrandt v. Russell*, 384 U.S. 11 (1966) (striking down a loyalty oath required of state employees), *Bates v. State Bar of Arizona*, 433 U.S. 340 (1977) (restricting governmental limitations on an attorney's right to engage in commercial speech), and *Baird v. State of Arizona*, 401 U.S. 1 (1971) (prohibiting the state from conditioning the practice of law by an otherwise qualified person upon certain views, beliefs, or associations). These cases do not address the issue presented by the Mallard appointment.

While Mallard attempts to import the grave concerns which arise when individuals are forced to act against the dictates of conscience, such concerns do not fairly apply. Mallard's unexplained "dislike" for certain manners and tones of speech appears to be a simple matter of temperament and taste, not rising to the level of conviction or conscience. Mallard is not being asked (let alone

required) to accept any particular point of view or to express any particular belief.[35] While it is true that his assignment as counsel in the *Traman* case will doubtless require him to speak and write, such activity is central to the notion of advocacy, and advocacy is central to the practice of law, Mallard's chosen profession.

This Court upheld the payment of required dues to an integrated bar, as against a first amendment challenge. "Payment of $15.00 as a condition of special privilege does not violate any provision of the Constitution." *Lathrop v. Donohue*, 367 U.S. 820, 865 (1961). Although the dissent was concerned with the free speech implications of the possibility of objectionable use of this compulsory payment, it is likely that Mallard's appointment on this record would have been approved.

> We would have a different case if lawyers were assessed to raise money to finance the defense of indigents. That would be an imposition of a duty on the calling which partook of service to the public. Here the objection strikes deeper – [that is] not part and parcel of service owing litigants or courts. *Lathrop*, 367 U.S. at 881, Douglas, J., dissenting.

In the context of public service owing to the courts, there is little if any difference demonstrated by Mallard in this record between the payment of money or time. There is nothing peculiar to Mallard or to these *pro se* clients justifying the denial on First Amendment grounds of his obligation of service. Whether section 1915(d) affects the

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[35] Indeed, in most cases it is unethical for a lawyer to express a personal belief as to the merits of a case or credibility of a witness. DR 7-106(C)(4), Iowa Code of Professional Responsibility.



authority of the Court to require Mallard to act as an advocate in a given case is the issue. Even if constitutional facets of this issue are considered, the record in this matter does not implicate any recognized first amendment rights.[36]

### C. THE ATTORNEY ASSIGNMENT SYSTEM THROUGH WHICH MALLARD WAS APPOINTED COMPORTS WITH DUE PROCESS AND EQUAL PROTECTION

The due process requirement of the fifth amendment embraces the analytically separate guarantee of equal protection of the law. *Bolling v. Sharpe*, 347 U.S. 497 (1954). To pass equal protection muster, a "classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

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[36] This first amendment argument might have had more force if the record disclosed: (a) Mallard had deep-seated convictions which directly related to his ability to perform certain tasks inherent in the advocacy role; (b) the *Traman* case involved the assertion of some position which Mallard found personally abhorrent; or (c) representation of the *Traman* clients themselves conflicted with some deeply-held belief of Mallard. Mallard has never asserted any of these positions, and neither has he argued that his "dislikes" rise to the level of impairing his ability to function as counsel. *See* DR 2-110(b)(3) and (C)(4). *See also* EC 2-28 ("The fulfillment of this objective [to make legal services fully available] requires acceptance by a lawyer of his share of tendered employment which may be unattractive both to him and the bar generally.").

Petitioner asserts that the subclass of lawyers who do not participate in the Volunteer Lawyers Project and who qualify for federal court assignment is a suspect class. He cites no authority for this novel proposition. As the suspect classes heretofore recognized by this court have involved groups of people associated with sober histories of invidious discrimination on a broad scale, the attempt to label this subclass of lawyers a suspect class trivializes the very concept. There is no legal or factual justification for the heightened scrutiny of that status.

The federal district court, working with the Volunteer Lawyers Project, devised a rotation system under which attorneys admitted to practice in federal court would be called upon to represent indigent federal court litigants who met the standards for appointed counsel. In order to ensure some measure of recent federal court experience and to do so in an administratively convenient manner, the court automatically exempted attorneys who had not been of record in federal court within the previous five years. Further, the court excluded from consideration bankruptcy court appearances in the reasonable belief that bankruptcy practice is distinct in several significant respects from general federal court practice.

Also excluded from the pool of attorneys subject to appointment were those lawyers participating in the Volunteer Lawyers Project. Again, it is reasonable to exclude those lawyers already involved in *pro bono* work through the Project. While it is true that an attorney might have been actively engaged in *pro bono* work other than



through the Project,[37] the Project constituted the only statewide *pro bono* program, and its roster of participants constituted the only readily identifiable group to which exemptions could reasonably be applied.[38]

Assuming for present purposes that the court's objective of arranging appointment of counsel for qualifying litigants was a valid one, the standards employed in administering the system were rationally related to that objective. The standards further the goal of selecting, in an easily administered fashion, attorneys with at least a modest level of federal court experience who were not already subject to *pro bono* program referrals.

## D. COMPELLING AN ATTORNEY TO PROVIDE REPRESENTATION WITHOUT COMPENSATION DOES NOT CONSTITUTE AN UNCONSTITUTIONAL TAKING OF PROPERTY

For purposes of this discussion, it may be assumed that the services which Mallard was called upon to pro-

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[37] In an October, 1988, Iowa Bar Association survey, 41 percent of *pro bono* work was attributed by answering attorneys to reduced rate court appointments; only 5 percent and 3 percent respectively were attributed to the Volunteer Lawyers Project and *pro bono* court appointments. These statistics are enlightening but inconclusive due to the size of the response to the survey (18 percent). "The News Bulletin", Vol. 48, No. 9, Iowa State Bar Association, October, 1988.

[38] Mallard has never claimed, and the record does not indicate, that he performed *pro bono* work equivalent to Project participation. Had this been the case, the magistrate may have exercised his discretion differently at the outset. *See e.g.*, Order, *Townsend v. Rice*, 84-655-A, Southern District of Iowa, Feb. 10, 1987, attached as Appendix II here.

vide in the *Traman* case would have been uncompensated.[39] Thus, the points of focus are whether such services constitute "private property" and whether requiring such services to be performed constitutes a "taking", within the meaning of the Constitution's just compensation clause ("[P]rivate property [shall not] be taken for public use, without just compensation").[40]

Petitioner devotes no analysis to the issue of how an attorney's services might relate to the "private property" language of the just compensation clause. Instead, he cites *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957)

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[39] In fact, under the terms of the appointment, Mallard's services would go uncompensated only if the claims of Mallard's clients, claims which had already passed initial screening by the court, ultimately proved unmeritorious, as to any of the issues raised. 42 U.S.C. § 1988. Amici California Attorneys for Criminal Justice and the National Association of Criminal Defense Lawyers strenuously assert constitutional and ethical objections to payment of costs by counsel appointed by the court, a distinction recognized by the Eighth Circuit as well. *Williamson v. Vardeman*, 674 F.2d 1211, 1215 (8th Cir. 1982) ("Requiring lawyers to pay the necessary expenses of criminal defense work without reimbursement is however constitutionally distinct from merely compelling lawyers to provide their services."). The issue is not however present in this case. Mallard's out-of-pocket costs would be reimbursed in any event.

[40] Although this is civil litigation, Petitioner's argument has significance for criminal cases as well. "If a requirement of uncompensated service in a criminal case does not constitute a 'taking' . . . then it cannot be said categorically that such violations exist in civil appointments. The two kinds of cases differ in degree but not in quality." *State ex rel Scott v. Roper*, 688 S.W.2d 757, 773 (Mo. Banc. 1985).



and *Konigsberg v. State Bar*, 353 U.S. 252 (1957) for the proposition that "[a]n attorney's services constitute 'private property' within the meaning of the Fifth Amendment." Petitioner's brief, page 57.[41]

But *Schware* and *Konigsberg* are not compensation cases. Rather, they interpret that part of the fifth amendment which prohibits the deprivation "of life, liberty or property, without due process of law." In that context, the practice of law was deemed a protectible property interest, and unreasonable standards for admission to the bar were struck down. However, these decisions did not address and do not resolve the different issue of whether a lawyer's services necessarily constitute "private property" within the meaning of the taking clause.

To establish this, Petitioner must show: (1) a reasonable expectation that his services are for his private use only and (2) that compulsory representation without compensation is not "fair". *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124-125 (1978). In some limited circumstances, services may constitute "property". *Butler v. Perry*, 240 U.S. 328 (1916); Green, "Court Appointment of Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance", 81 Columbia L. Rev. 366 (1981). However, an expectation that he

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[41] His position is made inconsistent by his apparent concession that the language of 42 U.S.C. 2000e-5(f)(1) allows compulsory appointment. Similarly, if compensation for service is made, but at a reduced rate limited by statute, then "just compensation" as constitutionally required has been denied for a portion of those services. *See* 18 U.S.C. § 3006A. A taking cannot be made constitutionally permissible, solely because accomplished by statute.

will never be called upon to represent an indigent civil litigant cannot reasonably be gleaned from this Court's holdings.

*Hurtado v. United States*, 410 U.S. 578 (1973) reaffirmed the established principle that "the Fifth Amendment does not require that the Government pay for the performance of a public duty it is already owed." *Id.* at 588. The *Hurtado* case involved the financial losses suffered during pretrial detention by a material witness, compensated by statute at only one dollar a day. The Court noted that there is "a public obligation to provide evidence," and that "this obligation persists no matter how financially burdensome it may be." *Id.* at 589.[42]

In rejecting this constitutional challenge, the *Hurtado* court cited with approval *United States v. Dillon*, 346 F.2d 633 (9th Cir.), *cert. denied*, 382 U.S. 978 (1965), as one of several examples of compulsory public service. *Hurtado*, 410 U.S. at 589. In *Dillon* the Ninth Circuit was confronted with the claim of a lawyer who, having earlier been "conscripted" to represent a prisoner in a proceeding under 28 U.S.C. § 2255, then applied to the court for compensation, arguing that failure to compensate would run afoul of the just compensation clause.

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[42] In a footnote, the Court quoted Professor Wigmore: "[I]t may be a sacrifice of time and labor, and thus of ease, of profits, of livelihood. This contribution is not to be regarded as a gratuity, or a courtesy, or an ill-required favor. It is a duty not to be grudged or evaded. Whoever is impelled to evade or to resent it should retire from the society of organized and civilized communities, and become a hermit. He who will live by society must let society live by him when it requires to." *Hurtado*, 410 U.S. at 589, n. 10, citing 8 J. Wigmore, Evidence § 2192, p. 72 (J. McNaughton rev. 1961).



In a much-quoted passage, the Ninth Circuit stated:

> An applicant for admission to practice law may justly be deemed to be aware of the traditions of the profession which he is joining, and to know that one of these traditions is that a lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order. Thus, the lawyer has consented to, and assumed, this obligation and when he is called upon to fulfill it, he cannot contend that it is a 'taking of his services.' 346 F.2d at 635.

The *Dillon* court drew support from *Powell v. State of Alabama*, 287 U.S. 45 (1932), in which this Court described the symbiotic responsibilities. "The duty of trial court to appoint counsel in such circumstances is clear . . . ; and its power to do so even in the absence of statute cannot be questioned. Attorneys are officers of the court, and are bound to render service when required by such an appointment." *Powell*, 287 U.S. at 73.

In rejecting the just compensation argument, the *Dillon* court held that there was no "taking", obviating any consideration of whether the lawyer's services had constituted "private property," *Dillon*, 346 F.2d at 636, although the analysis applies equally to both. Mallard knew upon entering the legal profession and the Bar of the United States District Court for Iowa in particular that some measure of public claim would be made upon his skilled services. Any expectation to the contrary is unreasonable and those services are, to that extent, not "*private* property."[43]

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[43] Application for bar memberships has been construed as consent to appointment. In a factually similar case, *Lewis v.*

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This representation without compensation can be a taking only if the government interferes with "reasonable investment-backed expectations." *United States v. Locke*, 471 U.S. 84, 107 (1985); *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979). See Brief of Amicus State Bar of California, pp. 27-28. All attorneys who take seriously their ethical obligation expect that a portion of their "stock-in-trade" will be given up for *pro bono* work. Any investment decision is based upon the inclusion of that time, not its exclusion. Only the exceptional case would be so great a burden as

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*Lane*, 816 F.2d 1165 (7th Cir. 1987), counsel upon learning of his appointment immediately asked the magistrate to be relieved, alleging incompetency and lack of time. In his denial, the magistrate "indicated that his membership in the southern district bar might be terminated if he declined the assignment." *Id.* at 1166. "Although Adams (counsel) was a reluctant appointee, he did validly consent to represent the plaintiffs." *Id.* at 1168. *See also Branch v. Cole*, 686 F.2d 264, 267 (5th Cir. 1982) ("If the court continues to have difficulty in obtaining the voluntary service of counsel despite their ethical responsibilities, it may wish to limit the compensated practice by members of its bar to those willing to accept their share of indigent cases."); *Family Div. Trial Lawyers v. Moultrie*, 725 F.2d 695, 699 (D.C. Cir. 1984) (" . . . the judges of the superior court repeatedly warn attorneys that they will not be appointed to [statutory] compensated cases if they do not also agree to represent indigent parents in neglect [non-compensated] cases."); Shapiro, "The Enigma of the Lawyers' Duty to Serve, 55 N.Y.U. L.Rev. 735, 746, n. 48 (1980), describing similar analysis in England in 1471.



to run counter to the expectation.[44] There is nothing in this record to even suggest that extraordinary burden on Mallard.

There is no taking where there is an exchange of benefits. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). Mallard derives the benefits of an esteemed, lucrative and exclusive profession, but he seeks to evade one of its most vital duties. This Court's approach in *Hurtado* rejecting such a position is controlling.

## IV. PETITIONER MADE NO SHOWING THAT HIS APPOINTMENT WAS UNREASONABLE UNDER THE CIRCUMSTANCES

As an exercise of section 1915(d) discretion or of inherent power, the question might remain whether the appointment of Mallard, in the circumstances prevailing, constituted an abuse of discretion. What record there is cannot support a finding of abuse but supports the action of the district court. *Roche v. Evaporated Milk Association*, 319 U.S. 21, 32 (1943) (mandamus will not lie where the district court has acted within its jurisdiction and rendered a decision which, even if erroneous, involved no abuse of power).

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[44] *See Family Division of Trial Lawyers v. Moultrie*, 725 F.2d 695, 705 (D.C. Cir. 1984) ("some pro bono requirements do not constitute a 'taking', we think it equally clear that an unreasonable amount of required uncompensated service might so qualify.").

The system under which Mallard was appointed was reasonably designed to accommodate the needs of the litigants, the bar, and the court.[45] Lawyers licensed to practice in federal court were selected on an alphabetical basis, with adjustments made as necessary for geographical convenience.[46] The panel of potential appointees was divided into thirds and rotated, so that, at most, an attorney would be subject to receiving an assignment no more often than every third year.[47] Out-of-pocket costs of representation were subject to reimbursement by the clerk of court.

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[45] The litany of procedural, ethical and constitutional problems decried by Amicus State Bar of California, Brief pp. 6-20, are either not applicable to Petitioner Mallard's circumstance as shown on this record or are addressed by the reasonable accommodations contained within the Iowa plan, which can be made to the individual appointee upon a showing of particular circumstances. The Iowa system is consistent with the call for a "conscientious objector" accommodation. A broad constitutional attack on that system is not supported by this record. *See State ex rel Partain v. Oakley*, 227 S.E.2d 314 (W. Va. 1976); Shapiro, The Enigma of the Lawyers' Duty To Serve, 55 N.Y.U. L.Rev. 735, 777 (1980).

[46] Mallard's Fairfield, Iowa office is only 60 miles from the site of incarceration of two of his clients, and that institution was also the focus of the litigated claims.

[47] Amicus Legal Service Corporation of Iowa notes that lawyers are projected to receive appointments once every five to six years.



Lawyers participating in the Volunteer Lawyers Project were exempted from federal court assignments.[48] Lawyers who were temporarily too busy to take on another case were accorded a grace period.[49]

Federal court experience on at least a modest level of competency was assured. Concerns with lack of familiarity with the legal context of the assigned case were met with support efforts by the Project. Such support services included written outlines and research guides pertaining to the legal issue in question, seminars on section 1983 and prisoner litigation,[50] and even consultation with attorneys experienced in the field. Of course, an appointed attorney always retained the option of petitioning the court for appointment of co-counsel, if believed necessary.

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[48] Participants in the Volunteer Lawyers Project decide what types of cases they are willing to accept, and are free to decline a given referral at any time. As with the federal court assignment system, out-of-pocket costs of representation are reimbursed, and any attorney fees paid under court order by the opposing party may be retained.

[49] The duty not to neglect the cases of current clients might sometimes require a lawyer to decline an appointment temporarily. *See* DR 6-10(A)(3). Amicus State Bar of California attempts to create a "double standard of competency" whereby "a lawyer who is trying to make ends meet may fail to exert the effort required in the indigent's case." Brief, p. 16. This ethical failure by a minority in the bar, is just as possible when *pro bono* time is volunteered and in any event is acknowledged by the appointment process used by the district court.

[50] One such seminar was held on July 31, 1987 in Grinnell, Iowa, only a few weeks after Mallard's appointment. The record does not disclose whether Mallard chose to attend.

Mallard has not argued that he was too busy with other cases, that he performed reasonable *pro bono* service in other contexts,[51] or that the assignment would work a financial or other hardship on him. Rather, he has vigorously (and competently) asserted his own incompetence, focusing on his experience and his preferences.

When the federal magistrate found Mallard to have litigation experience and thus competent, Mallard expanded his argument. Mallard argued to the district court "that he did not like the role of confronting other persons in a litigation setting, accusing them of misdeeds, or questioning their veracity." (J.A. 38)

Having spent two years as a creditor's attorney involved in debt collection and foreclosures in the 1980's, Mallard might be hard pressed to argue persuasively that he is incapable of confrontation. If he is arguing merely that he is less than comfortable with the basic lawyering activities of confrontation and cross-examination, then his point is simply irrelevant. Such predilections would appear to be just the sort of "consideration personal to the attorney" which, under his oath, is never sufficient cause for rejecting "the cause of the defenseless or oppressed." Iowa Code Section 602.10112(7) (1987).

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[51] Mallard had evidently never chosen to participate in the Volunteer Lawyers Project, and there is no indication on the record that he has performed other *pro bono* work which should be considered in connection with the appropriateness of this assignment.



Mallard sought and obtained membership in the Iowa bar, and in so doing voluntarily accepted the responsibilities and duties of an Iowa lawyer. Mallard took the further step of seeking and obtaining permission to practice before the United States District Court for the Southern District of Iowa, and in so doing must be deemed to have voluntarily accepted participation in the federal court assignment program which had been implemented a year earlier. No circumstance particular to Mallard's situation, or Traman's case, appears on this record which would render his appointment as counsel in any way unreasonable or overly burdensome.

## V. THE PERCEPTION OF JUSTICE AS EQUALITY BEFORE THE LAW IS AT ISSUE

The American system of justice espouses and is predicated upon equality of the adversaries before the law. It is the expectation that each party possesses an equal opportunity for presentation of its case to the impartial factfinder, from which presentations, truth will out. Inequality of opportunity[52] affects the validity of the decision, the respect for law and ultimately the very concept of justice itself.

" . . . Some way of providing legal services to those in need must be found. In the absence of those services the adversary process, whatever its shortcomings when all

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[52] Some inequality of presentation above a minimal level of competence, according to the skill of the advocate, is presumed by the system. This is a difference of degree in what is a recognized presumption of equality of opportunity.

interests are represented adequately, is especially vulnerable. We may disagree on when the "need" is sufficient, and on the ultimate means of eliminating that need, but the basic proposition remains." Shapiro, The Enigma of the Lawyers' Duty to Serve, 55 N.Y.U.L.Rev. 735, 780 (1980).

The issue of effective access "affects more than just the parties or the bar. It affects all citizens, for the cost of inefficient court proceedings prolonged by unrepresented parties is enormous." Amicus State Bar of California Brief, p. 19. These costs are both direct and indirect. Petitioner and Amici assert that the "solution of the unmet legal needs of the least among us cannot rest solely on the backs of private attorneys". *Id.* at 19. Conversely, neither can a workable, partial solution be discarded because it is only partial. Those other complementary solutions suggested by Amici and the commentators must be concurrently explored, both by the legislative and the judicial branch. "As the Cahns so aptly put it, 'the market is not for legal services: the market is for Justice.' " Cahn and Cahn, Power to the People or to the Profession? – The Public Interest in Public Interest Law, 79 Yale Law J. 1005, n. 16 (1970), quoted in Shapiro, The Enigma of the Lawyers' Duty to Serve, 55 N.Y.U.L.Rev. 735, 780 (1980).

The practice of law is more than a business. Whatever the validity of the assertion of contemporary "deprofessionalism", or the "shrinking nature of the lawyer's special preserve", Shapiro, *Id.* at 771, the practice of law is still imbued with a responsibility for the quality of



justice, which special relationship is possessed by no other profession.[53]

Justice Holmes when admonished by Learned Hand to "Do justice!" retorted: "That is not my job. My job is to play the game according to the rules." (Learned Hand, in Dillard, Irving, *The Spirit of Liberty*, 3rd Ed.; New York: Alfred A. Knopf, 1960, pp. 306-307.) There is nothing in those rules which calls upon the Eighth Circuit to mandate the Federal District Court in Iowa refrain from engaging Petitioner in a cooperative effort to work toward justice.

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[53] "The moral position of the advocate is here at stake. Partisan advocacy finds its justification in the contribution it makes to a sound and informed disposition of controversies. Where this contribution is lacking, the partisan position permitted to the advocate loses its reason for being. The legal profession has, therefore, a clear moral obligation to see to it that those already handicapped do not suffer the cumulative disadvantage of being without proper legal representation, for it is obvious that adjudication can neither be effective nor fair where only one side is represented by counsel." Lon Fuller, John Randall, Professional Responsibility: Report of the Joint Conference, ABA Journal, Vol. 44, 1159, 1216 (Dec. 1958).

## CONCLUSION

It is respectfully suggested that the Order of the Eighth Circuit Court of Appeals denying the writ of mandamus should be affirmed.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

GORDON E. ALLEN
Deputy Attorney General
*Counsel of Record for Respondent*

STEVE ST. CLAIR
Assistant Attorney General



## APPENDIX I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

CHAMBERS OF
HAROLD D. VIETOR
CHIEF JUDGE
UNITED STATES COURTHOUSE
EAST FIRST AND WALNUT
DES MOINES, IOWA 50309

Mailed to all lawyers by Iowa State Bar Association in February 1986.

February 14, 1986

Dear Lawyer:

The Federal Practice Committee of the Iowa State Bar Association has formulated a plan for Federal Pro Bono service in the Northern and Southern Districts of Iowa. It is our hope that with your cooperation we can efficiently serve the needs of indigent civil suit parties pursuant to the *Nelson* and *Hahn* decisions.[1]

To date these needs have been met by a small number of "volunteers", about 4% of Federal practitioners, who have taken cases by an individual request from the Court. The new plan, to be implemented January 1, 1986, will spread this work more equitably among all those admitted to practice in Federal Court. Once the determination of indigency is made the Volunteer Lawyers Project will assume responsibility for case assignment and monitoring. Please review the enclosed material from the Volunteer Lawyers Project for an overview of their program.

In the future we would like to develop a program staffed by lawyers who volunteer (without being drafted). However, until we are able to establish this phase of the

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[1] *Nelson v. Redfield Lithograph Printing*, 728 F.2d 1003 (8th Cir. 1984), *Hahn v. McLey*, 737 F.2d 771 (8th Cir. 1984).

project we continue to rely on the support we have received from you.

Very truly yours,

/s/ Harold D. Vietor
HAROLD D. VIETOR

/s/ Donald E. O'Brien
DONALD E. O'BRIEN

/s/ William C. Stuart
WILLIAM C. STUART

* * * * * * * * * * *

IMPORTANT NOTICE TO ALL
ATTORNEYS PRACTICING IN IOWA'S
NORTHERN AND SOUTHERN FEDERAL DISTRICT
COURTS

* * * * * * * * * * *

Concerning The Immediate Implementation Of A
Federal Pro Bono Referral System

As most Iowa lawyers are now aware, the 8th Circuit Court of Appeals has invoked its supervisory power over federal district courts to provide for the pro bono representation of certain indigent federal court litigants. In *Nelson v. Redfield Lithograph Printing*, 728 F.2d 1003 at 1005 (CA 8, 1984), the Court urged "the chief judge of each district to seek the cooperation of the bar associations and the federal practice committees of the judge's district



to obtain a sufficient list of attorneys practicing throughout the district so as to supply the court with competent attorneys who will serve in pro bono situations . . . "[1]

*Volume of appointments* – Qualifying litigants have been receiving such appointments since June of 1984. During the first year, a total of 130 such appointments were made in the Northern and Southern Districts combined. The vast majority of these cases are §1983 civil rights actions brought by prison inmates.

*Volunteer Lawyers Project* – Hereafter, the federal courts will be employing the services of the Volunteer Lawyers Project in arranging appointments. The Volunteer Lawyers Project will maintain for each of the two districts a list of all Iowa lawyers admitted to practice in federal court and, in the Southern District, in good standing in terms of federal C.L.E. credits. The combined lists will embrace about 3,500 lawyers.

*Panels* – The list of lawyers for each federal district will be divided into three panels. The panels will rotate, so that a lawyer will be on the current list of potential appointees no more often than every third year. The panel of 1986 will be comprised of lawyers with last names A through H; for 1987, last names I through O; for 1988, last names of P through Z. Within each current panel, names will be selected in a systematic manner but

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[1] The Eighth Circuit's position was further clarified in *Hahn v. McLey*, 737 F.2d 771 (1984) and *In The Matter of Attorney Robert J. Snyder*, 734 F.2d 334 (1984). See also 28 U.S.C. §1915(d) concerning the general power of appointment.

other than by straight alphabetical sequence. Adjustments will be made as necessary to maximize geographical convenience.

*Procedure* – When the federal district court determines that an indigent litigant qualifies for pro bono appointment of counsel, the court will order the Volunteer Lawyers Project to arrange for representation. The Project will proceed systematically through the list of lawyers, contacting the next lawyer on the current panel and arranging for representation. In proceeding through the list of lawyers, those lawyers already receiving pro bono referrals of state court cases through the Volunteer Lawyers project will generally *not* be requested to accept federal referrals as well. Similarly, those lawyers who have already received federal pro bono appointments since such appointments began in 1984 will be passed over initially.

*Costs and fees* – Although these cases are pro bono, lawyers may apply to the court for reimbursement of out-of-pocket costs of representation. Written instructions concerning cost reimbursement policies will be sent to each pro bono appointee at the outset of representation. In addition, lawyers appointed under this system are free to seek and keep whatever fee award might be available by statute from the opposing party.

*Support services* – Varied support services will be available to lawyers desiring assistance in connection with pro bono appointments. Support will include written materials dealing with the substantive and procedural law at issue, periodic seminars dealing with the issues most



frequently arising in this context, and consultation with experienced lawyers.

*Contact the Volunteer Lawyers Project (315 E. Fifth, Des Moines, Iowa, 50309; 515-243-2151 or 800-532-1275):*

1. If you wish to add your name to the list of lawyers willing to accept occasional referrals of low-income clients in state court actions, or desire more information about such participation;

2. If you are experienced in federal civil rights law, and would be willing to provide occasional consultative services to other lawyers in lieu of receiving direct appointments; or

3. If you are interested in attending a CLE-accredited seminar dealing with the law and procedures commonly arising in federal pro bono cases.

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## APPENDIX II

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF IOWA**
**CENTRAL DIVISION**

| | | |
|---|---|---|
| JAMES TOWNSEND,<br>Plaintiff,<br>vs.<br>BOB RICE & UNKNOWN OFFICERS,<br>Defendant. | ) | CIVIL NO. 84-655-A<br>ORDER<br>(Filed Feb. 10, 1987) |

A hearing on the motion for permission to withdraw filed January 14, 1987 was held on February 10, 1987. Craig R. Hastings appeared in support his motion.

After discussing the motion with Mr. Hastings at the hearing, Mr. Hastings supplemented his motion regarding his competency to handle the matter. The thrust of Mr. Hasting's concern is his lack of experience as a trial lawyer and his inability to handle a jury case. Mr. Hastings is fully cognizant of his responsibility to provide pro bono services. Mr. Hastings convinced the Court that he has provided substantial pro bono services in the past and is willing to do so in the future. He further indicated a willingness to accept pro bono appointments on matters pending in federal court insofar as they do not require him to act as a trial attorney.

With the record made at the hearing, the Court is satisfied that Mr. Hastings should be granted permission to withdraw in the above-entitled case.



The Court hereby finds that another counsel should be appointed to represent plaintiff in this matter. The Clerk of Court is hereby directed to obtain new counsel for plaintiff in this case under 28 U.S.C. § 1915(d) by referring this matter to the Volunteer Lawyers Project of Iowa.

IT IS SO ORDERED.

Dated this 10th day of February, 1987.

/s/ R. E. Longstaff
R. E. LONGSTAFF
U.S. MAGISTRATE

## APPENDIX III

## APPOINTMENT OF COUNSEL AND SECTION 1915(d): PAUPER PRIVILEGE AND JUDICIAL DISCRETIONARY DUTY

Steven Dow

Unpublished manuscript being prepared for publication under the supervision of Professor Geoffrey C. Hazard, Jr., reprinted by permission for convenience.

* * *

### II. Historical Interchangeability of "Request" and "Assign"

#### A. *Legislative History*

The legislative history surrounding the enactment of the original federal *in forma pauperis* statute is minimal. The original legislation was passed in 1892 and provided:

> That the court may request any attorney of the court to represent such poor person, if it deems the cause worthy of a trial, and may dismiss any such cause so brought under this act if it be made to appear that the allegation of poverty is untrue, or if said court be satisfied that the alleged cause of action is frivolous or malicious.[43]

The law is presumed to have been modeled upon an English statute of Henry VII from 1495.[44]

> It stated that the chancellor should assign 'learned counsel and attornies' for the preparation of suits 'without any reward taking therefore; and after the said writ or writs be returned, if it be afore the King in his bench, the justices there shall assign to the same poor person or persons, counsel learned, by their discretions, which shall give their counsels, nothing taking for the same: and likewise the justices shall appoint attorney and attornies for the same poor person or persons, and all other officers requisite and necessary to be had for the speed of the said suits to be had and made, which shall do their duties without any reward for their counsels, help and business in the same.[45]



A provision, added sometime before 1744 and designed to prevent frivolous and vain cases from being brought, required the pauper to have two counsel sign a petition certifying good cause for the suit and to name the counsel to be assigned by the chancellor.[46] Presumably the indigent had to persuade the two counsel "to donate their services at little or no cost, and if they did, it may well have turned out that they would end up representing the plaintiff in the suit."[47] It is uncertain how often courts appointed lawyers under the statute; however, by late 1800, the courts had "taken a broad plan for eliminating poverty as a hampering factor in civil litigation and by hedging it about here and trimming it there practically wreck[ed] it."[48] The statute was repealed in 1883,[49] nine years before the United States Congress enacted the predecessor to the current section 1915.

The impetus for the federal legislation was the existence of similar laws in several states. The House Report from the Committee on the Judiciary which accompanied the bill explained that "[m]any humane and enlightened States have such a law, and the United States Government ought to keep pace with this enlightened judgment."[50] By 1892, eleven states had adopted *in forma pauperis* statutes which included provisions for the

appointment of counsel; ten of them expressly prohibited the attorneys from taking a fee.[51]

When the federal bill was proposed in the House, it was described as "providing when plaintiff may sue as a poor person, and when counsel shall be *assigned* by the court."[52] In subsequent proceedings, the legislation was always referred to with the same terminology of court *assignment* of counsel.[53]

In the debate over the bill, a Congressman raised the question of how, since the indigent plaintiff was not required to pay the court costs, the court officers were to receive their pay and wanted clarification about whether they were to be compelled to work for nothing. The bill's sponsor replied,

> We are simply in these cases of charity and humanity compelling these officers, all of whom make good salaries, to do this work for nothing. That is all the bill does. There may be one such case upon a docket of five hundred; and they are not required to do much *ex-officio* service.[54]

It is clear from the wording of the statute that the attorneys are referred to separately from the other court officers,[55] but the legislature did not explicitly consider or discuss the nature of the attorneys' obligations and duties with respect to uncompensated mandatory service.

The legislative silence regarding the attorneys' plight suggests one of three things: 1) the legislators believed that attorneys obviously could be required to serve under a court appointment; 2) counsel was always so willing to accept court requests that it did not even occur to the legislators that attorneys would ever decline to accept an



appointment; or, 3) Congress thought it was transparently obvious that counsel could not be coerced into accepting court appointments.

In the absence of more detailed legislative history, it is impossible to know which, if any, of the three possible reasons was prevalent. This Note maintains that an analysis of other aspects of the historical situation reveals that a combination of the first two factors predominated in 1892: Congress implicitly assumed that counsel would always serve at a court's request, because the bar had an historical tradition as well as a recognized duty of doing so.[56]

The remedial purpose of the legislation was clear and undisputed: " . . . to open the courts of the United States to a class of American citizens who have rights to be adjudicated, but are now excluded practically for want of sufficient money . . . :"[57] As noted above, Congress clearly did not expect that the statute would be used very often.

The English courts and the state courts in the United States seldom utilized their authority to assign counsel. So too, the federal statute was infrequently used. One commentator writing in 1919 described the situation:

> The system of assignment of counsel looms large in the books, but has amounted to very little in practice. . . . For some reason this power seems never to have been used. . . . The system is so thoroughly in disuse that in many quarters its very existence is denied. The large majority of attorneys do not realize that there is any authority which can require them as a matter of duty to give their services without charge to poor persons.

> It is not easy to state with precision why a system so deep-rooted in the history of our legal institutions should both in England and in the United States fall into such neglect.[58]

He goes on to speculate that reasons for the disuse may include both a judicial failure to realize that people were in need of counsel as well as a reluctance to impose the financial hardship of uncompensated representation on attorneys. While courts were often willing to enforce the attorney's obligation in criminal cases, they seldom employed their power in civil situations.[59]

In the leading case on the attorney's obligation to accept a court appointment without compensation, *United States v. Dillon*,[60] the Ninth Circuit held that a district court order appointing an attorney to represent an indigent criminal defendant was not a taking of the attorney's property requiring compensation under the Fifth Amendment. The Court of Appeals did not distinguish between criminal and civil actions when it noted that:

> representation of indigents under court order, without a fee, is a condition under which lawyers are licensed to practice as officers of the court, and that the obligation of the legal profession to serve without compensation has been modified only by statute. An applicant for admission to practice law may justly be deemed to be aware of the traditions of the profession which he is joining, and to know that one of these traditions is that a lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order. Thus, the lawyer has consented to, and assumed, this obligation . . . [61]

The court cited and reprinted as an appendix the government's brief, which traced the origins and history



of the attorney's obligation to serve without compensation upon court appointment. The historical summary and analysis provided in *Dillon* may be misguided and not relevant to contemporary practice in the United States;[62] nevertheless, the case demonstrates that the view that unwilling attorneys could be compelled to represent indigents upon court appointment based upon the traditions of the bar was widely held and supports the contention that Congress in 1892 likely subscribed to such beliefs.

Indeed, some forty years after the statute was enacted, in the context of a criminal case, *Powell v. Alabama*,[63] the Supreme Court articulated its formulation of the general duty of an attorney to serve upon court assignment: "Attorneys are officers of the court, and are bound to render service when required by such an appointment."[64]

B. *Early Cases*

The earliest court interpretations of the *in forma pauperis* provision for counsel confirm both the interchangeability of the request and appoint language as well as the power of the court to appoint counsel in civil cases, even when compensation could not be guaranteed. In *Whelan v. Manhattan Ry. Co.*,[65] decided six years after enactment of the statute, a circuit court first ruled that a plaintiff's affidavit stated a cause of action which was not frivolous and then continued:

> It remains, however, for the court to provide an attorney to represent the poor person. . . . The attorney assigned by the court, in the event of nonsuccess,

> will, of course, receive nothing; in the event of final success, he may apply to the court for an order fixing a fair compensation for the services he may actually render . . .
>
> If the attorney who brought the action is willing to continue the litigation on those terms, he will be assigned to represent plaintiff; if not, the court will find some other attorney to prosecute her case.[66]

In the final paragraph, the court did not deny its power to compel an attorney to accept an appointment; rather, it averted the issue completely because it was confident that it could find a willing attorney. The fact that the court chose not to exercise its power does not imply that it did not, in fact, possess the power; it merely confirms the discretionary nature of the provision.

In 1899, in the case of *Brinkley v. Louisville & N.R. Co.*,[67] a Circuit Court suggested looking to the early English statute of Henry VII upon which the federal statute had been modeled in order to determine what the 1892 statute meant in its provision for the assignment of counsel. It chose not to exercise its discretionary power, because it found that the indigent was capable of presenting his case personally since he was a lawyer.

Given that the Congress and courts seemed to use "request" and "assign" synonymously, there may be little importance to the fact that the actual statutory language empowered the court to "request" counsel to serve. Nevertheless, its inclusion is somewhat perplexing due to the fact that the request language did not appear in other statutes[68] and was not derived from the original English law. This anomaly may have arisen because Congress intended to develop an efficacious law that would avoid



the specific problems of the *in forma pauperis* practice in England that had developed as a result of the stringent requirements that the petition be signed by two counsel. As discussed earlier, the English law had been repealed in 1883. Notwithstanding its intent that the law not be used too often, Congress may have sought to afford indigents opportunities to have their cases litigated which the English statute denied.

There is no indication in either the legislative history or early caselaw that the "request" language was specifically chosen with consideration for the potential burden on attorneys. Rather, the overwhelming impetus for the legislation was concern for the plight of indigents. Congress may have presumed that pro se litigants might not even have been aware that courts had authority to appoint counsel. Quite plausibly, the language was intended to urge courts to make appointments even when the indigent had not specifically asked for counsel.[69]

The indigent merely needed to file a statement under oath to commence an action; signature of counsel affirming that the cause of action was neither frivolous nor malicious was not required as it was in England. Thus, if the judge determined that a pauper needed assistance of counsel, he would be able to implement and effectuate his determination *sua sponte*. The early cases interpreting this provision seemed to construe the language to enable the court to appoint counsel regardless of whether the indigent actually petitioned for it.

In *Whelan*, there is no indication that the pauper's petition seeks an assignment of counsel. The action was initially brought with the assistance of counsel, but there

is no reason to believe that counsel sought dismissal or the appointment of alternate counsel. Rather, it appears that the court decided on its own to exercise its discretionary power, once it had determined that the plaintiff was indeed indigent and was stating a cause of action worthy of a trial.

Similarly in *Brinkley*, the court indicated that it would have appointed counsel, despite the fact that the plaintiff had not requested it, if the indigent had not indicated that he was a lawyer capable of handling his case pro se.

Thus, an historical analysis of the original 1892 statute suggests that Congress and the courts have always intended "request" and "assign" or "appoint" to be synonymous. Any dispute or controversy surrounding the particular language should be resolved by examining the underlying purpose of the legislation. The major function and intent of the *in forma pauperis* legislation was to ease the burdens on the poor. Hence, the choice of the request language ought to be construed from an historical standpoint to have broadened the discretion of the court by encouraging the appointment of counsel in accordance with the judge's own appraisal of the pauper's needs.

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[43] Act of July 20, 1892, ch. 209, 27 Stat. 252 (now codified at 28 U.S.C. § 1915 (1982) [hereinafter cited only by section number].

[44] Brinkley v. Louisville & N.R. Co., 95 F. 345,353 (C.C.W.D. Tenn. 1899); *see* Duniway, The Poor Man in the Federal Courts, 18 Stan. L. Rev. 1270, 1272 (1966).

[45] 11 Henry 7, c.12 (1495), quoted in Shapiro, *The Enigma of the Lawyer's Duty to Serve*. 55 N.Y.U.L.REV. 735,741 (1980).



[46] Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 362, 377 (1923).

[47] Shapiro, *supra* note 45, at 745.

[48] Maguire *supra* note 46, at 379.

[49] R. SMITH, JUSTICE AND THE POOR 22 (1919).

[50] H.R. REP. NO. 1079, 52d Cong., 1st Sess. 1 (1892).

[51] Fisch, *Coercive Appointments of Counsel* In Forma Pauperis: *An Easy Case Makes Hard Law*, 50 MO. L. REV. 527, 547 (1985).

[52] 23 CONG. REC. 5199 (1892).

[53] *Id.* at 5245, 6192, 6264, 6330, 6348, 6543.

[54] *Id.* at 5199.

[55] *Compare* § 3 ("That the officers of court shall issue, serve all process, and perform all duties in such cases") *with* § 4 ("That the court may request any attorney of the court to represent such poor person").

[56] H.R. REP. NO. 1079, 52d Cong., 1st Sess. 2 (1892).

[57] In enacting an analogous law in 1964, the Senate overwhelmingly rejected an amendment to the appointment of counsel provisions of Titles II and VII of the Civil Rights Act which would have precluded a judge from appointing an attorney without that attorney's consent. 110 Cong. Rec. 14201 (1964).

[58] R. SMITH, *supra* note 49, at 100-01.

[59] *Id.* at 230.

[60] 346 F.2d 633 (9th Cir. 1965) *cert. denied*, 382 U.S. 978 (1966).

[61] *Id.* at 635.

[62] Shapiro, *supra* note 45, at 747.

[63] 287 U.S. 45 (1932).

[64] Id. at 73.

[65] 86 F. 219 (C.C.S.D.N.Y. 1898).

[66] *Id.* at 220-21.

[67] 95 F. 345 (C.C.W.D. Tenn. 1899).

[68] *See, e.g.*, R. SMITH, *supra* note 49, at 231("Under the provision of the Soldiers' and Sailors' Civil Relief Act every court in the land is empowered in all cases and required in certain cases to assign counsel to act in behalf of men absent in military service.").

[69] Other statutes explicitly call upon the person seeking counsel to initiate the appointment process by requesting that counsel be appointed. *E.g.*, 42 U.S.C. § 1971(f)(1982) ("the court . . . shall immediately, *upon his request*, assign to him such counsel") (emphasis added); 42 U.S.C. § 2000e-5(f)(1) (1982) ("*Upon application by the complainant* and in such circumstances as the court may deem just, the court may appoint an attorney") (emphasis added). *See* Hilliard v. Volcker, 659 F.2d 1125, 1128 (D.C.Cir. 1981) ("Title VII imposes a duty on the court to consider an appointment of counsel for a complainant but only upon his application.").